Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

October Term, 1997

JOHN DALEY, *et al.*,

*Petitioners,*

v.

COMMISSIONER, DEPARTMENT OF MARINE RESOURCES, STATE OF MAINE,

*Respondent.*

Petition for Writ of Certiorari to the Supreme Judicial Court of the The State of Maine

## PETITION FOR WRIT OF CERTIORARI

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10 pp

## QUESTIONS PRESENTED

I. Did the Supreme Judicial Court of the State of Maine commit reversible error in law by holding that those sections of the 1995 Amendments to the Maine Lobster Fisheries Act, in combination with existing state statute, dealing with lobster trap limits levied on individual, State-of-Maine, license holders beyond the three mile limit in the Federal Exclusive Economic Zone (EEZ) were not preempted by Federal Statute?

II. Did the Supreme Judicial Court of the State of Maine commit a reversible error in law when it held that a family member exemption contained in the 1995 Amendments to the Maine Lobster Fisheries Act did not violate Equal Protection of the law as provided for in the Fourteenth Amendment to the United States Constitution?

III. Did the Supreme Judicial Court of the State of Maine commit reversible error in law by holding that trap limits contained in the 1995 Amendments to the Maine Lobster Fisheries Act did not, in effect, represent an unconstitutional infringement on certain lobstermen's property interests and, thus, an unconstitutional taking of their property in violation of the Fourteenth Amendment to the United States Constitution?

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IN ITS CONSIDERATION REGARDING WHETHER THE STATUTE IN QUESTION CONSTITUTED A REGULATORY TAKING OF THE LEGITIMATE, INVESTMENT BACKED EXPECTATIONS OF THOSE LOBSTER FISHERMEN WHO TRADITIONALLY AND FOR GENERATIONS HAVE FISHED IN EXCESS OF 1200 LOBSTER TRAPS, THE MAINE SUPREME JUDICIAL COURT CLEARLY ERRED IN ITS INTERPRETATION OF THIS COURT'S HOLDINGS REGARDING SUCH REGULATORY TAKINGS. .... 10

IN ITS DECISION BELOW, THE MAINE STATE SUPREME JUDICIAL COURT JUSTIFIED A DECISION THAT A FAMILY MEMBER EXCEPTION TO THE 1200 TRAP PER BOAT LAW DID NOT VIOLATE EQUAL PROTECTION AND JUSTIFIED THIS DECISION BY REASONING THAT SINCE A STATE COULD REGULATE A WHOLE FISHING INDUSTRY, IT COULD ALSO DISCRIMINATE AMONGST THE INDIVIDUAL FISHERMEN IN THAT INDUSTRY, AND SUCH A DECISION GOES BEYOND THE REALM OF THAT WHICH IS PERMITTED BY THE U.S. CONSTITUTION. . . . . 11

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## PETITION[1] FOR WRIT OF CERTIORARI

The Petitioners in this matter respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court sitting at the Law Court entered in this proceeding on August 8, 1997 in order to resolve conflicts between

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[1]Named petitioners are: John Daley, Forrest Merchant, Helen D. Gordon, Howard F. Gordon, Jr., Philip Dunbar, David Spearen, Bobbie Spearen, David Richardson, Donald Tozier, Michael Witick, Herbert Lowell, Roger M. Chipman, Harold W. Crowley, Dana B. Rice, Hollis D. Smith, Sr., Harold T. Hammond, Daniel W. Backman, Fred Backman, Ernest Libby, Jr., Steven Crowley, Norman L. Libby, Sr., Glenn S. Libby, Lebaron W. Libby, Sr., Ivan F. Libby, Mark R. Carver, Archie Alley, Jr., Nathan E. Fagonde, Roy A. Fagonde, Jay C. Kelley, Lindell L.beal, Anthony L. Beal, Winworth N. Alley, Arden N. Alley, Clinton L. Libby, Lyman A. Crowley, Millard L. Crowley, Jason E. Crowley, VertlA. Crowley, Millard E. Crowley, Closson F. Alley, Leroy W. Chandler, Vincent F. Maclean,jr., Carroll E. Chandler, John C. Faulkigham, Loren C. Faulkingham, Edward A. Fagonde, Charles P. Huntley, Vinal W. Crowley, Millard L. Crowley, Jeffrey S. Alley, Robert W. Alley, John V. Pray, Wilfred M. Lenfestey, Olive M. Lenfestey, Glenn S. Beal, Charles Fagonde, Robert Jones, Allan E. Alley, Sr., Darrell K.e. Kelley, Ernest V. Kelley,jr., Travis E. Beal, Wendell T. Alley, Ennis W. Wright, Ordman C. Alley, Calvin F. Beal,jr., Farrell E. Beal, Calvin S. Beal, Roger S. Beal,iii, Brian L. Alley, Raynard F. Alley, Ralph E. Alley, Joyce L. Alley, Lorenzo V. Wallace, Herman Backman,iii, Osmond Beal, Harry B. Alley, Christina L. Chandler, Jim Merryman, Richard Merryman, David Merryman, William Clemons, James Clemons, John Coffin, Douglas W. Reynolds, Mike W. Reynolds, Ernest W. Cirone, Melvin A. Davis, Ronald Looke, George H. Ingersoll, Jr., Raymond S. Joy, Sheldon V. Crowley, Dean R. Crowley, Mariner S. Burgess, Jr., Philip J. Kilton, Iii, Herbert L. Hart, Sr., Stephen C. Denny,Larry W. Smith, Timothy W. Pottle, Allan R. Merchant, Allen Merchant, I, Keith A. Crowley, Jr., Keith A. Crowley, Sr., William F. Bickford, Donald J. Handy, James D. Crowley, James Johnson, Larry S. Davis, John P. Droain, Bruce W. Porter, Burton D. Maker, Kenneth H. Dennison, Vance Davis, Michael S. Porter, Mark L. Mcguire,Gerald Cates, Jr., Joan Mackeen, Raymond Mackeen, Raymond Dennison, Jeffrey A. Davis, Peter W. Taylor, Steven W. Taylor, Sterling Fitzhenry, Randy J. Dennison, Keith M. Dennison, Norbert P. Lemieux, Nicholas P. Lemieux, Celia M. Lemieux, Jasper C. Cates, William F. Harrington, Stephen C. Cates, Brian S. Cates, Wendell R. Bryant, Joshua M. Cates, Jeff Davis, Scott A. Roberts, Dain H. Allen, Ralph Steene, Ronald Crocker, Holly C. Allen, Andrew S. Roberts, James G. Hanna, Tom W. Coffin, Dennis Y. Dyer, Andrew P. Todd, Donald W. Ulrickson, Adam D. Ulrickson, Andrew C. Ulrickson, Thomas L. Clemons, and Richard D. Pesce

the Maine court's judgment and that of the 1st Circuit Court of Appeals as well as conflicts with certain rights guaranteed to the Petitioners by Federal statute and the Supremacy Clause and Fourteenth Amendment to the United States Constitution on the important issues presented herein

## OPINIONS BELOW

The Petitioners brought this matter before the Washington County Superior Court, State of Maine on a Complaint for Declaratory Judgment (A copy of this Complaint is attached hereto at Appendix ("App.") at page A-1) to argue, among other things, the constitutional issues presented by an Act of the state legislature entitled "An Act to Establish a Management Framework for the Lobster Fishery with State Waters." (Pertinent section of the bill are quoted *infra).* Respondent replied with a Motion to Dismiss and/or Motion for Summary Judgment. On August 16, 1996, the trial court filed an opinion and order granting Respondent's motions. App. at page B-1. An appeal of the trial court's order was submitted on briefs to the Maine Supreme Judicial Court sitting as the Law Court ("Law Court") on March 24, 1997. The Law Court affirmed the judgment of the trial court on August 8, 1997. App. at page C-1.

## JURISDICTION

Petitioners seek a review by this Court, among other reasons, because this case concerns a final judgment of the highest court of a state, where the validity of a state statute is being drawn into question on the grounds that it is repugnant to the Constitution and the law of the United States. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

## PERTINENT STATUTES AND ORGANIC LAW INVOLVED IN THE CASE

The Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 *et seq.*, states in pertinent part:

**Sec. 1802 - Definitions**

> (6) The term "exclusive economic zone" means the zone established by Proclamation Numbered 5030, dated March 10, 1983.
>
> For purposes of applying this chapter, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States.

**Sec. 1811. United States sovereign rights to fish and fishery management authority**

(a) In the exclusive economic zone

> [T]he United States claims, and will exercise in the manner provided for in this chapter, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.

(b) Beyond the exclusive economic zone

> The United States claims, and will exercise in the manner provided for in this chapter, exclusive fishery management authority over the following:
>
> (1) All anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except

that management authority does not extend to such species during the time they are found within any waters of a foreign nation.

(2) All Continental Shelf fishery resources beyond the exclusive economic zone.

Maine statute states as follows:

**Offshore waters and submerged land**

The jurisdiction of this State shall extend to and over, and be exercisable with respect to, waters offshore from the coasts of this State as follows:

1. Marginal sea. The marginal sea to its outermost limits as said limits may from time to time be defined or recognized by the United States of America by international treaty or otherwise;

2. High seas. The high seas to whatever extent jurisdiction therein may be claimed by the United States of America, or to whatever extent may be recognized by the usages and customs of international law or by any agreement, international or otherwise, to which the United States of America or this State may be party;

2-A. --harvesting (*sic*). The State of Maine declares that it owns and shall control the harvesting of the living resources of the seas adjoining the coastline for a distance of 200 miles or to the furthest edge of the Continental Shelf, whichever is greater, subject only to the boundary with Canada. Control over the harvesting of these living resources shall be by licenses or permits issued by the Department of Marine Resources;

1 M.R.S.A. § 2

In its 1995 Amendments to the Maine Lobster Licensing Law, the Legislature states:

**Rules of construction**

The following rules of construction apply to this Part, unless a different construction is plainly required by the context.

• • •

3. General application. Marine resources' laws shall apply to all registered vessels and to all persons where their activities occur within the State, within the coastal waters of the State or where the product of those activities are brought into the State or its coastal waters. They shall also apply to all residents of the State wherever those activities are conducted, but not within the jurisdiction of another state.

12 M.R.S.A. § 6302. It further states:

**Boat trap limit**

1. Boat limit. Except as provided in subsection 2, it is unlawful to tend more than 1,200 traps from a boat in the coastal waters of the State.

2. Exception. Two or more holders of Class I, Class II or Class III licenses issued under section 6421 who harvest lobsters from the same boat may collectively tend more than 1,200 traps from that boat if the license holders:

• • •

B. Document to the commissioner that the license holders fished an average of more than 1,200 traps from a boat in the coastal waters of the State in calendar year 1994 and calendar

> year 1995 and are family members. For the purposes of this paragraph, being "family members" means that one license holder on the boat must be related to each of the license holders on the boat as either a spouse, sibling, parent by blood, parent by adoption, child by blood, child by adoption, stepchild, stepparent, grandchild or grandparent.

12 M.R.S.A. § 6431-D

The United States Constitution states in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, an Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl. 2.

The United States Constitution further states in pertinent part:

> No State shall make or enforce any law which shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.* at Amend. IV, § 1.

## STATEMENT OF THE CASE

Petitioners reside, for the most part, in Hancock and Washington Counties, Maine. They are, for the most part, employed

as lobster fishermen or are family members of lobster fishermen, and have been at all times relevant to this action.

During 1994 and 1995, the Maine Legislature set about to amend Maine Lobster Fisheries Act, located at 12 M.R.S.A. § 6301 through § 6463, for reasons of conservation of the lobster resource in the State of Maine. These amendments were approved by the Governor on July 3, 1995. In summary, those enactments:

1) established eligibility criteria for persons who could obtain a license in order to limit entry into the lobster fishery (12 M.R.S.A. § 6421 (Supp. 1995));

2) set a trap limit of 1,200 traps per license holder, with a phase-in period in limited instances *(Id.* at § 6431-A);

3) set a trap limit of 1,200 traps per boat, with a phase-in period and exceptions in limited instances *(Id.* at § 6431-D);

4) authorized the DMR to establish Lobster Management Zones and Lobster Management Policy Councils, with the power to regulate lobstering outside the three-mile limit *(Id.* at § 6446-6447); and

5) placed other restrictions on the harvest of lobsters that are not relevant to this action.

The Petitioners, below as Plaintiffs, fall into the category of persons that are adversely affected by certain of the sections of the Maine statutes as enacted by the state legislature.

On April 17, 1996, Petitioners filed a Complaint for Declaratory Judgment in Washington County Superior Court wherein they prayed that the 1995 Amendments be declared illegal and unconstitutional. They complained and asserted that the Legislature acted unconstitutionally, violated their right to equal protection under the law, and enacted statutes that are preempted by federal law. On May 14, 1996, an assistant attorney general, representing appellee filed a Motion to Dismiss Complaint for Declaratory Judgment. Petitioners replied with a Memorandum of Law in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiffs' Motion

for Summary Judgment. The Motions were argued before the Superior Court (J. Alexander) on August 6, 1996. The Court's Opinion and Order was filed on August 16, 1996 which granted defendant's Motion to Dismiss and Summary Judgment to the Defendant. On August 30, 1996, plaintiff's filed a Notice of Appeal to the Law Court. The Clerk of the Washington County Superior Court forwarded its record to this Court on September 19, 1996.

On March 24, 1997 the appeal was submitted to the Law Court on briefs. On August 8, 1997, the Law Court affirmed the judgment of the trial court and decided, among other things that:

1) Citing a state case, State v. Hayes, 603 A.2d 869 (Me. 1992), the court held that it had already found that federal statute did not preempt state law as regards a lobster management plan beyond the the three-mile limit despite the fa ct that the binding authority of the 1st Circuit Court of Appeals in Davrod Corp. v. Coates, 971 F.2d 778 (1992), and persuasive authority of the 11th Circuit's *dicta* in Southeastern Fisheries Association, Inc. v. Chiles, 979 F.2d 1504 (1992), both decided after the Hayes case, held that state regulation outside of the three-mile limit was indeed preempted by the federal Magnuson Fishery Conservation and Management Act. *See* App. at page C-7.

2) The Law Court, citing Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) and stating that, in its opinion, the trap limit set by the law does not interfere with any legitimate investment-back expectation of those lobster fishermen who have traditionally and for many years fished thousands of traps in excess of the statute-imposed limits. The court so held despite the fact that these lobster fishermen have invested, for years and generations, in multiple boats, wharfs, warehouses, refrigeration equipment, trucks, and numbers of employees in order to operate and service their business. The size of their operations depends, logically, on the numbers of lobsters they can catch and, *ergo*, on the number of traps they can fish. *See* at page C-8 to C-11.

3) The family member exception to the trap limit set by the statute, per boat, does not deny equal protection of the laws to those individuals who, in the past, have operated businesses with in excess of 1200 traps but have no history of family members being licensed and working in their businesses. The court reasoned that since their decisions in the past had upheld the state's right to regulate activities of whole industries doing business in the state, the state would also have the right to arbitrarily regulate individual citizens and treat them differently within the same industry. App. at page C-3 to C-5.

Petitioners now appear and request a Writ of Certiorari of this Court.

## REASONS FOR GRANTING THE WRIT

### I. THE MAINE SUPREME JUDICIAL COURT'S OPINION IN THIS AND EARLIER CASES REGARDING FEDERAL PREEMPTION OF THE MAINE STATUTE DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST CIRCUIT IN *DAVROD* AND IS CONTRARY TO THE *DICTA* OF THE ELEVENTH CIRCUIT IN *SOUTHEASTERN FISHERIES.*

In Petitioner's appeal to the Law Court, that court was presented with the Davrod and Southeastern Fisheries citations and argument thereon. In these cases, the circuits held that regulation by a state of marine resources outside the state's territorial waters was preempted by federal statute. ("Thus, the Magnuson Act ... confirmed state jurisdiction over fisheries within a State's internal waters, anf for coastal states, out to the three-mile limit." Davrod, 971F.2d at 785-786; "[The Magnuson Act] provided the states with an active role in managing the resources of the EEZ through their voting positions on

a council; granted the ultimate responsibility for overseeing the program to the Secretary of Commerce; and left nothing pertaining to the EEZ for the states to regulate." Southeastern, 979 F.2d at 1509.)

The Law Court failed to consider this authority in its decision below. *See* Sup. Ct. R. 10(b) (state court of last resort has decided a federal question in a way that conflicts with the decision of a United States court of appeals). A writ of certiorari is, therefore, appropriate here.

## II. IN ITS CONSIDERATION REGARDING WHETHER THE STATUTE IN QUESTION CONSTITUTED A REGULATORY TAKING OF THE LEGITIMATE, INVESTMENT BACKED EXPECTATIONS OF THOSE LOBSTER FISHERMEN WHO TRADITIONALLY AND FOR GENERATIONS HAVE FISHED IN EXCESS OF 1200 LOBSTER TRAPS, THE MAINE SUPREME JUDICIAL COURT CLEARLY ERRED IN ITS INTERPRETATION OF THIS COURT'S HOLDINGS REGARDING SUCH REGULATORY TAKINGS.

This Court has identified three factors to be addressed as part of such a regulatory taking inquiry: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. Connally, 475 U.S. at 224-25. The aim of this fact-bound inquiry is to determine whether "the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public [read industry] as a whole." Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992); *see also* Tri-State Rubbish, Inc. v. Town of New Gloucester, 634 A.2d 1284, 1288 (Me. 1993).

The Law Court, in its analysis of Connolly suggests that the third fact, *i.e.*, the character of the government action is the most important or telling of the 3-prong test. Furthermore, that court, in its reasoning, found that the "record on this challenge presents no evidence that the Amendments [to the state statute] will impose a

severe economic burden on the industry." *See* App at page C-9 to C-10. This clearly misses the point of the analysis which this Court has set out, where it is the impact on the individual within the industry, not the industry, which is pivotal.[4]

Clearly, then, a state court has decided an important question of federal law in a way that conflicts with the applicable decisions of the Court regarding a fundamental right, or, at the very least, has made a decision in such a way that a conflict has arisen which should be settled by this Court. *See* Sup. Ct. R. 10( c ). A writ of certiorari is, therefore, appropriate.

## III. IN ITS DECISION BELOW, THE MAINE STATE SUPREME JUDICIAL COURT JUSTIFIED A DECISION THAT A FAMILY MEMBER EXCEPTION TO THE 1200 TRAP PER BOAT LAW DID NOT VIOLATE EQUAL PROTECTION AND JUSTIFIED THIS DECISION BY REASONING THAT SINCE A STATE COULD REGULATE A WHOLE FISHING INDUSTRY, IT COULD ALSO DISCRIMINATE AMONGST THE INDIVIDUAL FISHERMEN IN THAT INDUSTRY, AND SUCH A DECISION GOES BEYOND THE REALM OF THAT WHICH IS PERMITTED BY THE U.S. CONSTITUTION.

In effect, the decision below would allow ten family members to fish 1200 traps each from one boat or 12,000 traps where, another

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[4] *See, also,* Justice Scalia's analysis in the Lucas case where he states that it was an error to assume that "the landowner whose deprivation is one step short of complete is not entitled to compensation." *Id.* While such a landowner "might not be able to claim the benefit of our categorical formulation," *id.*, namely the "deprivation of all economically feasible use" rule, he could still avail himself of the *ad hoc*, factual inquiry. Lucas v. South Carolina, 505 U.S. 1003, 112 S. Ct. 2886, 2894 (1992)

citizen, one who, prior to the statute, may have fished 12,000 traps from several boats, is compelled to limit himself to 1200 traps no matter how many boats he has traditionally used and how may traps he has traditionally fished.

The Maine Law Court in its previous decisions has stated that the equal protection clause of the U.S. Constitution is implicated when action by the state results in treatment of a person different than the treatment given similarly situated individuals. *See* Aucella v. Town of Winslow, 583 A.2d 215, 216 (Me. 1990); Wellman v. Department of Human Services, 574 A.2d 879, 883 (Me. 1990). "[I]f there be no real difference between the localities, or business, or occupation, or property, the state cannot make [a law] in order to favor some persons over others" without offending federal equal protection guarantees. *See, also,* Associated Hospital Service of Maine v. Mahoney, 161 Me. 391, 213 A.2d 712, 723 (1965).

This Court has jurisdiction to consider, and should consider, those questions which arise when a state's highest court decides a statute where the validity of which is drawn in question "on the ground of its being repugnant to the Constitution.... 28 U.S.C. § 1257(a). Again, a writ of certiorari is appropriate in this case.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

C. Clifton Fuller, III, Esquire
Attorney for the Petitioners

# APPENDIX

## Sections A-C

**Appendix A**

**STATE OF MAINE SUPERIOR COURT**
**WASHINGTON COUNTY, SS. CIVIL ACTION**

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|---|---|---|
| **JOHN DALEY, AND FORREST MERCHANT, AND HELEN D. GORDON, AND HOWARD F. GORDON, JR., AND PHILIP DUNBAR, AND DAVID SPEAREN, AND BOBBIE SPEAREN, AND DAVID RICHARDSON, AND DONALD TOZIER, AND MICHAEL WITICK, AND HERBERT LOWELL, AND ROGER M. CHIPMAN, AND HAROLD W. CROWLEY, AND DANA B. RICE, AND HOLLIS D. SMITH, SR., AND HAROLD T. HAMMOND, AND DANIEL W. BACKMAN, AND FRED BACKMAN, AND ERNEST LIBBY, JR., AND STEVEN CROWLEY, AND NORMAN L. LIBBY, SR., AND GLENN S. LIBBY, AND LEBARON W. LIBBY, SR., AND IVAN F. LIBBY, AND MARK R. CARVER, AND ARCHIE ALLEY, JR., AND NATHAN E. FAGONDE, AND ROY A. FAGONDE, AND JAY C. KELLEY, AND LINDELL L.BEAL, AND ANTHONY L. BEAL, AND WINWORTH N. ALLEY, AND ARDEN N. ALLEY, AND CLINTON L. LIBBY, AND LYMAN A. CROWLEY, AND MILLARD L. CROWLEY, AND JASON E. CROWLEY,** | ) | Doc No. CV-96-030 |

AND VERTLAND A. CROWLEY, AND )
MILLARD E. CROWLEY, AND )
CLOSSON F. ALLEY, AND LEROY W. )
CHANDLER, AND VINCENT F. )
MACLEAN,JR., AND CARROLL E. )
CHANDLER, AND JOHN C. )
FAULKIGHAM, AND LOREN C. )
FAULKINGHAM, AND EDWARD A. )
FAGONDE, AND CHARLES P. )
HUNTLEY, AND VINAL W. CROWLEY, )
AND MILLARD L. CROWLEY, AND )
JEFFREY S. ALLEY, AND ROBERT W. )
ALLEY, AND JOHN V. PRAY, AND )
WILFRED M. LENFESTEY, AND OLIVE )
M. LENFESTEY, GLENN S. BEAL, AND )
CHARLES FAGONDE, AND ROBERT )
JONES, AND ALLAN E. ALLEY, SR., )
DARRELL K.E. KELLEY, AND ERNEST )
V. KELLEY,JR., AND TRAVIS E. BEAL, )
WENDELL T. ALLEY, AND ENNIS W. )
WRIGHT, AND ORDMAN C. ALLEY, )
AND CALVIN F. BEAL,JR., FARRELL E. )
BEAL, AND CALVIN S. BEAL, AND )
ROGER S. BEAL,III, AND BRIAN L. )
ALLEY, AND RAYNARD F. ALLEY, )
AND RALPH E. ALLEY, AND JOYCE L. )
ALLEY, AND LORENZO V. WALLACE, )
AND HERMAN BACKMAN,III, AND )
OSMOND BEAL, AND HARRY B. )
ALLEY, AND CHRISTINA L. )
CHANDLER, AND JIM MERRYMAN, )
AND RICHARD MERRYMAN, AND )
DAVID MERRYMAN, AND WILLIAM )
CLEMONS, AND JAMES CLEMONS, )
AND JOHN COFFIN, AND DOUGLAS W. )
REYNOLDS, AND MIKE W. )

REYNOLDS, AND ERNEST W. CIRONE, )
AND MELVIN A. DAVIS, AND RONALD )
LOOKE, AND GEORGE H. )
INGERSOLL, JR., AND RAYMOND S. )
JOY, AND SHELDON V. CROWLEY, )
AND DEAN R. CROWLEY, AND )
MARINER S. BURGESS, JR., AND )
PHILIP J. KILTON, III, AND HERBERT )
L. HART, SR., AND STEPHEN C. )
DENNY,AND LARRY W. SMITH, AND )
TIMOTHY W. POTTLE, AND ALLAN R. )
MERCHANT, AND ALLEN )
MERCHANT, I, AND KEITH A. )
CROWLEY, JR., AND KEITH A. )
CROWLEY, SR., AND WILLIAM F. )
BICKFORD, AND DONALD J. HANDY, )
AND JAMES D. CROWLEY, AND )
JAMES JOHNSON, AND LARRY S. )
DAVIS, AND JOHN P. DROAIN, AND )
BRUCE W. PORTER, AND BURTON D. )
MAKER, AND KENNETH H. )
DENNISON, AND VANCE DAVIS, AND )
MICHAEL S. PORTER, AND MARK L. )
MCGUIRE,AND GERALD CATES, JR., )
AND JOAN MACKEEN, AND )
RAYMOND MACKEEN, AND )
RAYMOND DENNISON, AND JEFFREY )
A. DAVIS, AND PETER W. TAYLOR, )
AND STEVEN W. TAYLOR, AND )
STERLING FITZHENRY, AND RANDY )
J. DENNISON, AND KEITH M. )
DENNISON, AND NORBERT P. )
LEMIEUX, AND NICHOLAS P. )
LEMIEUX, AND CELIA M. LEMIEUX, )
AND JASPER C. CATES, AND WILLIAM )
F. HARRINGTON, AND STEPHEN C. )

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| **CATES, AND BRIAN S. CATES, WENDELL R. BRYANT, AND JOSHUA M. CATES, AND JEFF DAVIS, AND SCOTT A. ROBERTS, AND DAIN H. ALLEN, AND RALPH STEENE, AND RONALD CROCKER, AND HOLLY C. ALLEN, AND ANDREW S. ROBERTS, AND JAMES G. HANNA, AND TOM W. COFFIN, AND DENNIS Y. DYER, AND ANDREW P. TODD, AND DONALD W. ULRICKSON, AND ADAM D. ULRICKSON, AND ANDREW C. ULRICKSON, AND THOMAS L. CLEMONS, AND RICHARD D. PESCE,** Plaintiffs, | ) |
| v. | ) |
| **COMMISSIONER ROBIN ALDEN,** Defendant. | ) |

# COMPLAINT FOR DECLARATORY JUDGMENT

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**NOW COME** the above-named plaintiffs, through counsel, and, by way of Complaint against the above-named defendant, state as follows:

## I. JURISDICTION AND VENUE

IV. This Court has jurisdiction over the claims set forth in the causes of action because they are of the nature of actions brought under the Maine Declaratory Judgment Act, 14 M.R.S.A. § 5951 *et seq*, and plaintiffs are complaining for a determination about the legality and constitutionality of certain 1995 amendments to the Maine Lobster Fisheries Act, located at 12 M.R.S.A. § 6301 through § 6463. Superior Court has original jurisdiction over this cause of action since the offending statute has penalty sections punishable by criminal charges which could be brought and could ultimately be tried in the Superior Court. Defendant is an appointed official of

the State of Maine charged with the enforcement of the complained-of statute.

V. Venue is proper in this Court in that the majority of the plaintiffs are residents of Washington County. The illegal acts which are authorized by the statutes adversely affect these plaintiffs as commercial lobster fishermen. Those plaintiffs who are not residents of Hancock county would be similarly affected by the statute and accede to the jurisdiction and venue of this Honorable Court.

## II. PARTIES

I. The majority of plaintiffs in this action are commercial lobster fishermen, or family members, whose livelihood is directly affected by state attempts to regulate lobster fishing, and residents of Washington County, State of Maine. The other plaintiffs are commercial lobster fishermen and residents of other counties in the State of Maine who accede to the jurisdiction and venue of this court for purposes of this action.

II. Defendant Robin Alden is the Commissioner of the Department of Marine Resources, State of Maine, and responsible for the enforcement of the amendments to statute which plaintiffs allege are illegal and/or unconstitutional.

## GENERAL ALLEGATIONS

1. During 1994 and 1995, the Maine Legislature set about to amend Maine Lobster Fisheries Act, located at 12 M.R.S.A. § 6301 through § 6463, for reasons of conservation of the lobster resource in the State of Maine.

2. These amendments (hereinafter called the "1995 Amendment") were approved by the Governor on July 3, 1995.

3. Among other things, the 1995 Amendment seeks to conserve lobster resources by:

   a. Regulating lobster fishing outside the three-mile territorial limit of the state;

   b. Setting per-licensee trap and boat trap limits on lobster fishermen;

c. Providing exceptions for fishing families;

d. Seeking to enforce regulations only upon Maine residents;

e. Not seeking to limit lobster trawling;

f. Causing commercial lobstermen to disclose proprietary information;

g. Not seeking to deal with recreational or subsistence lobster fishermen;

h. Placing severe limits on the size of commercial lobstermen's fishing businesses;

i. Creating management zones within municipal harbors; and

j. Delegating the power to set fees to the Department of Marine Fisheries.

**WHEREFORE,** plaintiffs pray that this Court hold that the 1995 Amendments are illegal and/or unconstitutional in the following areas and for the following reasons:

a. As the federal Magnuson Fishery Conservation and Management Act has preempted the entire field of lobster fishery regulation within the exclusive economic zone, the 1995 Amendments to the Maine Lobster Fisheries Act, insofar as they attempt to regulate lobster traps and the fishing of traps beyond the three-mile territorial limit, are preempted and unenforceable.

b. The per-licensee trap limits and boat trap limits conflict with the Magnuson Act and are therefore preempted by federal law.

c. The 1995 Amendments provide an exception to trap limits for family members which violates the rational basis of conservation of the resource and, thereby, discriminates against larger commercial fishing enterprises.

d. The 1995 Amendments violate the equal protection clause, of the United States Constitution, as they

arbitrarily discriminate between Maine residents and nonresidents with respect to enforcement of the regulations within the EEZ.

e. Because the 1995 Amendments to the Maine Lobster Fisheries Act do not adequately address or limit lobster trawling, the Amendments violate equal protection and due process.

f. The Department of Marine Resources may not require lobstermen to disclose confidential business or proprietary information regarding sales of lobsters as a prerequisite to obtaining a license, at least without first providing adequate safeguards preventing further disclosure of such information to third parties.

g. The licensing requirements of the Maine Lobster Fishery Act, as amended by the 1995 Amendments thereto, do not apply to recreational or subsistence lobster fishing, and, therefore, discriminate against recreational fishermen.

h. The 1995 Amendments to the Lobster Fisheries Act effect an unconstitutional regulatory taking of the plaintiff lobstermens' property rights.

i. The 1995 Amendments to the Lobster Fisheries Act, by authorizing the creation by the Department of Marine Resources of Lobster Management Zones anywhere within the coastal waters of the state, including within municipal harbors, unconstitutionally infringe upon the home rule powers of municipalities.

j. The 1995 Amendments to the Lobster Fisheries Act, by failing to set adequate standards to guide the Department of Marine Fisheries in fixing trap tag fees, unconstitutionally delegate the power to tax to the Department of Marine Fisheries.

**WHEREFORE**, plaintiffs further pray that this Court order that, because the 1995 Amendments are illegal or unconstitutional, plaintiffs need not adhere to their dictates.

DATED at Belfast, Maine this 10th day of April, 1996.

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**APPENDIX B**
STATE OF MAINE
WASHINGTON, SS.

**B-1**
SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-96-030

JOHN DALEY, et al.,

Plaintiffs

OPINION AND ORDER

v.

COMMISSIONER, DEPARTMENT
OF MARINE RESOURCES,
STATE OF MAINE,[1]

Defendant

This matter is before the court on the defendant, Department of Marine Resources' Motion to Dismiss and plaintiffs' responding request for summary judgment.

The action, by approximately 200[2] plaintiffs who are commercial lobster fishermen or family members,

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[1]The commissioner of the Department of Marine Resources, Robin Alden, was originally the principal named defendant. However,the caption is changed to reflect the fact that the suit is more appropriately brought against the Department and the office than any individual incumbent.

[2]This number is based on a statement by plaintiffs' counsel at oral argument, the court has not counted the plaintiffs.

challenges, on constitutional or federal preemption grounds, a number of 1995 amendments to the Maine Lobster Fisheries Act. P.L. 1995, ch. 468.

Key provisions of the 1995 amendments:

(1) created eligibility criteria for individuals to obtain a license, 12 M.R.S.A. § 6421 (5) & (5-A);

(2) established an apprentice program to train new entrants to the lobster fishery, 12 M.R.S.A. § 6422;

(3) set a trap limit of 1,200 traps per license holder, with a phase in period through the year 2003 for some license holders, 12 M.R.S.A. § 6431-A;

(4) subject to an exception for family members who have fished from the same boat, set a trap limit of 1,200 traps per boat, again with a phase in period, 12 M.R.S.A. § 6431-D;

(5) authorized the Department of Marine Resources to establish a trap tag system to identify and track traps, 12 M.R.S.A. § 6431-B;

(6) authorized the Department of Marine Resources to set and collect fees for a Lobster Management Fund to cover the cost of its implementation of the lobster fisheries management program, 12 M.R.S.A. §§ 6431-B & 6431-C; and

(7) authorized establishment of lobster management zones controlled by locally selected councils, 12 M.R.S.A. §§ 6446 - 6447.

The 1995 amendments included other provisions not implicated in this action.

Plaintiffs[1] complaint raises a number of challenges to the 1995 amendments. Issues regarding those challenges will be addressed individually. However, the court first outlines its general principles governing review of the legal issues raised by the motion to dismiss and the constitutional challenges.

On review of the motion to dismiss, the facts alleged in the complaint are taken as true for purposes of analyzing

the legal issues. In examining a request for summary judgment, the court's review authority is a bit broader. There the court must examine disputes as to material facts. In this case, while the State has moved to dismiss, the plaintiffs have, in response, requested summary judgment. Once summary judgement is sought, the issues may be considered under the no disputes as to material fact standard, with it possible to award summary judgment in favor of either the moving or non-moving party. All uncertainties of material facts must be resolved against the moving party or left to proof at trial. However, the plaintiff lobstermen have a heavy burden as any challenger to the constitutionality of a state law has a heavy burden of proof; Aseptic Packaging Council v. State, 637 A.2d 457, 459 (Me. 1994); Maine Milk Producers v. Commissioner of Agriculture, 483 A.2d 1213, 1218 (Me. 1984).

With this background of the court's standard of review, the court proceeds to address the issues in this

case.

**EQUAL PROTECTION:**

Plaintiffs assert that the 1995 amendments violate the Equal Protection Clause of the United States Constitution (and presumably the Maine Constitution ) in two ways:

First, by exempting from the 1,200 trap limit boats operated by several licensed family members but not boats operated as a larger commercial venture by licensed individuals that have a business but not a family relationship, and

Second, by applying the trap limits to Maine residents but not nonresident lobstermen fishing in waters beyond the three mile limit.

The challenged statutes here do not either infringe upon a fundamental constitutional right or involve an inherently suspect classification. Thus, they are not analyzed under the "strict scrutiny" or "compelling

government interest" test. Cf. Tri-State Rubbish v. Town of New Gloucester, 634 A.2d 1284, 1287 (Me. 1993). The "rational relationship" test applies here. Differing treatment accorded persons who are arguably similarly situated must be approved unless plaintiffs can prove that the differing treatment is not rationally related to a legitimate state interest. Aseptic Packaging Council v. State, supra, at 459. A party alleging that a legislative classification violates equal protection on this "rational relationship" test must show "by clear and irrefutable evidence its arbitrariness and irrationally discriminatory nature." State v. Eaton, 577 A.2d 1162, 1166 (Me. 1990).

It would seem evident that the Legislature may act, in support of a legitimate State interest, to protect a resource from over fishing by actions including limitations on fishing methods, the size and number of lobsters taken, season for fishing, the number of licenses and the number of traps. Cf. Massey v. Appolonio, 387 F. Supp. 373, 377

(D. Me. 1974); State v. Hayes, 603 A.2d 869 ( Me. 1992).

It is possible and rational to think that the Legislature might have determined that establishing a limited exception to allow family members to continue a tradition of multiple license holders fishing from a single boat did not greatly aggravate a threat of over fishing the lobster resource. The Legislature could also have rationally determined that allowing an unlimited number of license holders to fish from the same boat, and thus allowing absolutely unlimited numbers traps for any particular boat, could easily and quickly negate the lobster conservation goals of the legislation. No facts alleged by the plaintiffs in their complaint negate or demonstrate irrationality of these possible legitimate legislative purposes. Thus, even taking the present pleadings most favorably to the plaintiffs, they fail to prove that the "family boat" exception to the per boat trap limit is not rationally related to a legitimate legislative purpose.

Accordingly, this prong of plaintiffs[1] equal protection claim must fail.

The 1995 amendments also do not discriminate in regulating the activities of Maine residents and Maine registered boats in the exclusive economic zone[3] (EEZ) while not similarly regulating nonresidents and their boats. One suspects that, to conserve the vital lobster fishery, the State would dearly like to regulate the activities of non-residents and their boats within the EEZ off the Maine Coast. The State cannot do so, as such regulation is prohibited as a matter of the limitation on the State's sovereignty which can only extend to its residents and registered boats. The fact that the State chooses to extend such regulation to its residents and registered boats does not then amount to discrimination. The Maine legislation is regulating all that it can regulate, addressing the lobster fishery within the EEZ.

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[3]This is the zone between the three-mile limit and the 200-mile limit or the continental shelf.

**FEDERAL PREEMPTION:**

The plaintiffs argue that the Federal Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 - 1863 preempts the State from regulating lobster fishing activities and imposing conservation restrictions on the lobster fishery with the exclusive economic zone. Plaintiffs' argument ignores the express terms of the federal law which indicate that a State may not directly or indirectly regulate fishing boats in the EEZ: "Unless the vessel is registered under the law of that state." 16 U.S.C. § 1865 (a) (3) ; State v. Hayes, 603 A.2d 869, 870 (Me. 1992).

Plaintiffs' argument also ignores several provisions of regulations approved by the Secretary of Commerce to implement the recently published Federal Lobster Management Plan. The Federal Plan recognizes and legitimates concurrent state jurisdiction and allows for enforcement of more restrictive State conservation measures against both owners and operators of boats

subject to state regulation. See 50 C.F.R. § 949.3 (b) : "Nothing in these regulations shall supersede more restrictive State management measures for American lobsters." See also 50 C.F.R. § 649.4 (c) and 50 C.F.R. § 649.5 (c) which further legitimate application of more restrictive state regulations to lobster fishery and conservation activities.

The restrictions imposed by the Maine Legislature in 1995 are not preempted by federal law. Now, with the new Federal Lobster Management Plan, the state restrictions are explicitly authorized by federal law. See also State v. Hayes, supra, which recognized the authority of the State to regulate activities of Maine registered boats consistent with the federal laws, prior to publication of the Federal Lobster Management Plan.

**OTHER ISSUES:**

Plaintiffs[1] challenge to the 1995 amendments include a number of other claims which do not merit

serious discussion and some of which border on frivolity.

1. Plaintiffs complain that the 1995 amendments do not adequately address trawling for lobsters. They do not need to. Trawling for lobsters is absolutely prohibited under Maine law, 12 M.R.S.A § 6952, State v. Hayes, supra.

2. Plaintiffs assert that the 1995 amendments amount to an unconstitutional taking. However, even at oral argument, plaintiffs were never able to clearly identify what is being taken. They only assert some vague right that, once you are engaging in a commercial activity in an unlimited fashion, the State cannot limit such activities without such limitation amounting to a taking. The court is aware of no precedent, in Maine or elsewhere, that supports this position.

3. Plaintiffs[1] complaint expresses concern about perceived discrimination against subsistence or recreational fishermen. Any concern in this area is

resolved by enactment of 12 M.R.S.A. § 6421 (3-A) (F) which was adopted by P.L. 1995, ch. 568, sec. 1, effective March 26, 1996.

4. Plaintiffs assert a violation of the home rule provisions of the Constitution, but point to no competing local activity allegedly improperly preempted. On this point, there appears to be no real case in controversy for the court to litigate.

5. Plaintiffs assert some apparently due process based constitutional violation in their claim that implementation of regulations for qualification for lobster licenses improperly requires disclosure of proprietary information to licensing authorities. But here there is a legitimate question as to whether any properly proprietary information must be disclosed at all. Again, no precedent appears to support plaintiffs[1] claim.

6. Finally, plaintiffs assert that legislative authorization to impose trap tag fees and other fees to

cover the costs of administering the program amounts to an improper delegation of taxing powers under the Maine Constitution. However, it is well established that agencies with legislative authorization may set and collect fees to cover the costs of specific agency activities from those regulated by such activities and that such fees are not taxes, Strater v. Town of York, 541 A.2d 938 (Me. 1988) ; Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1004 (Me. 1980).

Therefore, the court determines that each of the plaintiffs challenges to the 1995 amendments imposing conservation controls on the lobster fishery fails as a matter of law.

Therefore, the court ORDERS and the entry shall be:

1. The State's Motion to Dismiss is **GRANTED** .

2. Plaintiffs[1] request for summary judgment is GRANTED against the plaintiffs.

3. Judgement for the State and the Department of Marine Resources that plaintiffs are not entitled to

relief on any of the claims they present.

DATED : August 15, 1996 _____
Donald G. Alexander

JUSTICE, SUPERIOR COURT

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 1997 ME 183

Docket: Was-96-571

Submitted

on Briefs: March 24, 1997

Decided: August 8, 1997

Panel: WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, DANA, and LIPEZ, JJ.

JOHN DALEY, et al

v.

COMMISSIONER,
DEPARTMENT OF MARINE RESOURCES
STATE OF MAINE

LIPEZ, J.

[¶1] John Daley, et al.[1] (Daley) appeals from the judgment entered in the Superior Court (Washington County, *Alexander, J.* ) in favor of the State in an action

[1]Daley and the other plaintiffs are lobster fishermen or are family members of lobster fishermen residing for the most part in Hancock and Washington counties.

challenging the constitutionality of the 1995 Amendments to the Maine Lobster Fisheries Act, 12 M.R.S.A. §§ 6301-6463 (1994 & Supp. 1996) (the 1995 Amendments). Daley claims several errors in the ruling. We find none and affirm the judgment.

I.

[¶2] In 1996 Daley filed a complaint making ten claims and seeking a declaratory judgment, 14 M.R.S.A. §§ 5951- 5963 (1980), that the 1995 Amendments aimed at conserving the lobster resource along the coast of Maine, P.L. 1995, ch. 468 (effective March 1, 1996), were illegal and unconstitutional. The State responded with a motion to dismiss, and Daley replied with both an opposition to the State's motion and a motion for a summary judgment. After a hearing, the court entered a summary judgment in

[2]The court's order also states that the "State's Motion to Dismiss is GRANTED." Given the plaintiffs' motion for a summary judgment, which was accompanied by two affidavits, and the fact that the court therefore considered material outside the pleadings, we treat this appeal as having been taken from the entry of a summary judgment.

the State's favor.[2] Daley's appeal concerns four of his original ten claims.

II.

[¶3] When reviewing an appeal from the entry of a summary judgment we view the evidence in the light most favorable to the party against whom judgment was entered and review the trial court's decision for errors of law. *Gonzales v. Commissioner, Dept. of Public Safety*, 665 A.2d 681, 682 (Me. 1995). When the record generates no issue of material fact and the moving party is entitled to a judgment as a matter of law, we affirm. *Id.* at 682-83.

Family Member Exemption

[¶4] The 1995 Amendments set a limit of 1,200 traps per boat, with a phase-in period and exceptions for license-holders who are family members fishing from the same boat. 12 M.R.S.A. § 6431-D(2)(B) (Supp. 1996).[3]

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[3]The statute states in pertinent part:

> Two or more holders of [the relevant] licenses . . . who harvest lobsters from the same boat may collectively tend more than 1,200 traps from that boat if the license holders:

Daley argues that the exemption draws an invidious distinction between classes of Maine citizens and thereby violates the equal protection clauses of the Maine and United States Constitutions.

[¶5] The family member exemption to the boat trap limit implicates neither a fundamental right nor an inherently suspect classification, and therefore will survive an equal protection challenge if its different treatment of similarly situated persons bears any conceivable rational relation to a legitimate state interest. *Aseptic Packaging Council v. State,* 637 A.2d 457, 459-60 (me. 1994). The family member exemption passes this test. There is no

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B. Document... that the license holders fished an average of more than 1,200 traps from a boat in the coastal waters of the State in [calendar years 1994 and 1995] and are family members. For the purposes of this paragraph, being "family members" means that one license holder on the boat must be related to each of the license holders on the boat as either a spouse, sibling, parent by blood, parent by adoption, child by blood, child by adoption, stepchild, stepparent, grandchild or grandparent.

(1) When license holders qualify under this paragraph, the trap limit for the boat is the product of 1,200 multiplied by the number of license holders who are family members documented

dispute that the 1995 Amendments advance legitimate state interests in protecting the marine environment and the conservation of natural resources. See, e.g., *Maine v. Taylor,* 477 U.S. 131, 140 (1986) (upholding stature prohibiting importation of out-of-state baitfish); *State v. Richardson,* 285 A.2d 842. 844-45 (Me. 1972) (state may legitimately prohibit possession of lobsters on board any boat rigged for otter or beam trawling). Moreover, the provision does not draw an invidious distinction between classes of Maine citizens. The Legislature may have determined that the tradition of family-related license-holders fishing from a single boat did not pose a threat to the lobster resource, while allowing an unlimited number of unrelated license-holders to do so would have placed

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under this paragraph who continue to harvest lobsters from the boat in . . . 1996 and consecutive calendar years thereafter . . . .

12 M.R.S.A. § 6431-D(2)(B)

too much pressure on the fishing resource.[4] See *Aseptic Packaging,* 637 A.2d at 460 (in performing rational basis analysis, court may go beyond face of statute to determine whether any conceivable state of facts exists to support it).

Federal Preemption

[¶6] Daley contends that the 1995 Amendments' per-licensee and boat trap limits, 12 M.R.S.A. §§ 6431-A(1), are preempted by the Magnuson Fishery Conservation and Management Act, 16 U.S.C.A. §§ 801-1883 (1985 & West Supp. 1997), in which Congress assumed exclusive authority of fishery management within the federal "exclusive economic zone" (EEZ), an area extending 197 miles beyond Maine's three-mile maritime

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[4]It is not unusual for the Legislature to enact statutory exemptions to protect and foster the development of family-owned enterprises. **See 7 M.R.S.A. § 34(1) (1989) (family farm corporation exemption from Agricultural Land Interest reporting requirements); 26 M.R.S.A. § 663(3)(J) (1988) (exempting certain family members from State minimum wage laws); 26 M.R.S.A. § 1043(11)(F)(6) (1988) (exempting certain family members from State unemployment compensation coverage).**

boundary. 16 U.S.C.A. § 1802(11). We have already decided that enactments such as the 1995 Amendments are not unconstitutional by virtue of preemption, *State v. Hayes,* 603 A.2d 869, 870-71 (Me. 1992), due primarily to the Magnuson Act's preservation of the states' authority to regulate state-registered vessels within the EEZ. 16 U.S.C.A. § 1856(a)(3).[5] Moreover, the federal lobster management plan contains no limit on the number of traps that may be fished, authorizes concurrent state jurisdiction, and expressly allows the enforcement of more restrictive state law requirements.[6]

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[5]At the time of the 1995 Amendments' enactment, the Magnuson Act stated in pertinent part: "[A] state may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State." That language has since been strengthened by amendment. See 16 U.S.C.A.§ 1856(a)(3) (West Supp. 1997).

The 1995 Amendments apply to state-registered vessels, a category defined to include those vessels owned or operated by a person licensed under Maine's marine resources law. See 12 M.R.S.A. § 6001(36)(1994); *State v. Hayes*, 603 A.2d869,870-71(Me.1992).Accordingly, any person licensed to harvest lobsters by the State of Maine operates a Maine-registered vessel for the purposes of the Magnuson Act.

[6]See,e.g., 50 C.F.R.§ 649.3(b) (1996) ("Nothing in these reg-

Regulatory Taking

[¶7] The 1995 Amendments set limits of 1,200 traps per license-holder, 12 M.R.S.A. § 6431-A(1), and 1,200 traps per boat, id. § 6431-D(1), with seven-year phase-in periods for both. Id. §§ 6431-A(2), 6431-D(2)(A)(1). Daley argues that these provisions constitute regulatory takings of property in violation of both the Maine and United States Constitutions because many of the plaintiffs entered the lobstering industry long before any limitations on traps had been contemplated, and the limitations therefore interfere with their legitimate investment-backed expectations as to the continued and profitable use of their boats and other equipment. We disagree because of the application of the three factors identified by the United

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ulations shall supersede more restrictive state management measures for American lobsters."), § 649.4(c) ("If a requirement of this part and a management measure required by state or local law differ, any vessel owner permitted to fish in the EEZ must comply with the more restrictive requirement."), § 649.5(c) ("If a requirement of this part and a management measure required by state or local law differ, any operator issued a permit under this part must comply with the more restrictive requirement.")

States Supreme Court as particularly significant to the regulatory taking analysis.[7] See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (court must inquire as to economic impact of the regulation on the claimant, extent to which the regulation has interfered with distinct investment-backed expectations, and character of the governmental action).

[¶8] First, there is nothing in the record which precludes the conclusion that the governmental action at issue here is permissible regulation that "adjust the benefits and burdens of economic life to promote the common good." Id. at 225. Second, the record on this challenge

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[7]The State's argument to the contrary notwithstanding, Daley does not complain of a substantive due process violation and raises a regulatory taking claim only. Although, as the United States Supreme Court has noted, "it would be surprising indeed to discover" that a regulation deemed to comport with due process standards was nonetheless violative of the Takings Clause. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211(1986), the required analyses remain distinct. *See Concrete Pipe & Products of California v. Construction Laborers Pension Trust*, 508 U.S. 602, 636-47 (1993) (addressing substantive due process and regulatory taking claims made as to the same regulation). Whereas a regulatory taking analysis demands inquiry into the economic impact of the regulation on the claimant, the extent to

presents no evidence that the Amendments will impose a severe economic burden on the industry. *Maine Beer & Wine Wholesalers v. State*, 619 A.2d 94, 99 & n.7 (Me. 1993).[8] Third, Daley has not demonstrated a legitimate investment expectation in a regulatory status quo. See id. at 99; see also *Connolly*, 475 U.S. at 227 ("those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amend-

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which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental aciton, as well as whether the claimant has been singled out to bear a burden that should be borne by the public as a whole, 475 U.S. at 224-27, a substantive due process analysis focuses on the rationality of the enactment, that is, on whether the regulation at issue is in the interest of the public welfare and whether the methods used bear a rational relationship to its intended goals. 508 U.S. at 637; *National Hearing Aid Ctrs., Inc. v. Smith*, 376 A2.d 456, 460 (Me. 1977).

[8]By allowing those who have historically fished more than 1,200 traps from a single boat to do so until the year 2003, 12 M.R.SA. §§ 6431-A(2), 6431-D(A)(1), the Amendments are tailored to avoid imposing a severe economic burden on the industry by enabling larger commercial lobster firms to gradually reduce the number of traps fished and avoid precipitous, dramatic contractions in their operations. See *Connolly*, 475 U.S. at 225-26 (finding no impermissible regulatory taking in part because of significant number of provisions that "moderate and mitigate the economic impact" of the regulations).

ments to achieve the legislative end."(quotation omitted)).[9]

Unconstitutional Vagueness and Delegation of Power

[¶9] The 1995 Amendments authorize the Commissioner of the Department of Marine Resources (DMR) to impose per-tag fees to cover the costs of a tag system to identify and track traps, 12 M.R.S.A. §§ 6431-B, 6431-C, as well as the costs of establishing lobster management zones and the lobster management policy councils. 12 M.R.S.A. §§ 6446, 6447. Daley contends that these provisions are void for vagueness and constitute an improper delegation of the taxation power. See Me. Const. art. IX, § 9

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[9]The United States Supreme Court also has indicated that "[w]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 503 U.S., 519, 522-23 (1992) (cited in *Tri-State Rubbish, Inc. v. town of New Gloucester*, 634 A.2d 1284, 1288 (Me. 1993); *Concrete Pipe*, 508 U. s. at 646-47; *Connolly*, 475 U.S. at 227-28. Daley has not shown that either the purpose of the Amendments or the extent of the burden they place on the plaintiffs suggests that they unfairly single out the lobster industry to bear a burden "which, in all fairness and justice, should be borne by the public as a whole." 475 U.S. at 227 (quotation omitted).

("The Legislature shall never, in any manner, suspend or surrender the power of taxation."). These arguments are unpersuasive. There is nothing unconstitutionally vague about the provision that empowers DMR to impose a fee to defray the costs of administering its regulatory program. Moreover, because the fee is designed to pay for administrative costs and not to raise general revenue, the Legislature did not improperly delegate its power to tax to the DMR. *Board of Bar Overseers v. Lee*, 422 A.2d 998, 1004 (Me. 1980), appeal dismissed, 450 U.S. 1036 (1981) (distinguishing between a tax designed to raise revenue and license fees imposed to cover costs of program administration pursuant to the government's police power to regulate); *Strater v. Town of York*, 541 A.2d 938, 938 (Me. 1988) (same principle in context of harbor usage fee).

The entry is:

Judgement affirmed.

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